FCC Received July 23, 1993 @ 9:10 a.m.
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1	TRANSCRIPT OF PROCE	EDINGS
2	Before the	
3	FEDERAL COMMUNICATIONS Washington, D.C.	
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5	IN THE MATTER OF:	MM DOCKET NO. 93-155
6	RICHARD BOTT II	
7	and WESTERN COMMUNICATIONS, INC.	
8	Blackfoot, Idaho	RECEIVED
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11		FEDERAL COMMUNICATIONS COMMISSION! OFFICE OF THE SECRETARY
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24	DATE OF CONFERENCE: July 20, 1993	VOLUME: 1
2 <u>5</u>	PLACE OF CONFERENCE: Washington, D.C.	PAGES: 1-36

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1	Before the
_	FEDERAL COMMUNICATIONS COMMISSION JUL 2 8 1993 Washington, D.C. 20554
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_	FEDERAL COMMUNICATIONS COMMISSION
3	FEDERAL COMMUNICATIONS OFFICE OF THE SECRETARY
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4	In the matter of:
_	) MM Docket No. 93-155
5	RICHARD BOTT II )
_	and )
6	WESTERN COMMUNICATIONS, INC.
_	)
7	Blackfoot, Idaho
0	)
8	Mhe shows entitled metter some or few probagging
9	The above-entitled matter came on for prehearing conference pursuant to notice before Judge Arthur I.
7	Steinberg, Administrative Law Judge, at 2000 L Street, N.W.,
10	Washington, D.C., in Courtroom No. 3, on Tuesday, July 20,
TO	1993 at 9:00 a.m.
11	1335 ac 3.00 a.m.
12	APPEARANCES:
13	On behalf of Richard Bott II:
14	JAMES P. RILEY, Esquire
	KATHLEEN VICTORY, Esquire
15	Fletcher, Heald and Hildreth
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16	Eleventh Floor
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	On behalf of Western Communications, Inc.:
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	On behalf of the Mass Media Bureau:
22	
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	Washington D.C. 20554

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25	CONFERENCE BEGAN: 9:02 a.m. CONFERENCE	ENDED: 9:53 a.m.

## PROCEEDINGS

2	JUDGE STEINBERG: We're on the record now. This is
3	a prehearing conference in MM Docket Number 93-155 involving
4	the application of Richard Bott II and Western Communications,
5	Incorporated for assignment of the construction permit of
6	station KCVI FM in Blackfoot, Idaho. The case was designated
7	for hearing on June 15, 1993 by a corrected hearing
8	designation order and notice of opportunity for hearing.
9	By order released June 21, 1993, the chief
10	administrative law judge assigned the case to me and set the
11	date of the hearing for October 26, 1993. In an order prior
12	to prehearing conference released June 24, 1993, I directed
13	counsel for the parties to confer for the purpose of exploring
14	discovery, the stipulation of uncontested facts, the
15	submission of their affirmative direct cases in writing, and
16	possible settlement and to report to me at this conference the
17	results of this meeting. Let me first take the appearances of
18	counsel. For Richard Bott II?
19	MR. RILEY: James P. Riley and Kathleen Victory of
20	Fletcher, Heald and Hildreth.
21	JUDGE STEINBERG: For Western Communications,
22	Incorporated?
23	MR. OXENFORD: David Oxenford and I'll be appearing
24	as co-counsel with Lester Spillane who has entered a notice of
25	appearance in this proceeding.

JUDGE STEINBERG: Now, Mr. Spillane indicated that he was just basically appearing because Western was involved in the assignment, but that he was not going to basically take an active role as -- are you going to follow in --MR. OXENFORD: It's our view of the issue, Your Honor, that basically it's Mr. Bott's issue to resolve and we're here basically to protect our interests to observe what's happening and comment, if necessary. But for the most part, we don't see that that'll be required. JUDGE STEINBERG: And finally, for the chief of the Mass Media Bureau? MR. GOLDSTEIN: Norman Goldstein and Y. Paulette Laden. JUDGE STEINBERG: Before we get into other things, let me summarize for the record what's currently pending. On June 25, 1993, Bott filed with the Commission a petition for leave to file a petition for reconsideration and then an accompanying petition for reconsideration. Bott argues in essence that the designation of Issue

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Bott argues in essence that the designation of Issue A, the misrepresentation/lack of candor issue, was premised upon an error of fact and that Issue A should be deleted.

Since the other issue specified against Bott flow from Issue A, Bott also contends that Issues B and C are moot and that

<u>k y papidanji ozuki na animona afi ak-</u>

The Mass Media Bureau, on July 8, 1993, filed an opposition to the petition for leave to file a petition for reconsideration arguing largely on procedural grounds that Bott's petition for leave to file should be denied. These pleadings are presently pending before the Commission. On July 6, 1993, Bott filed before me a motion to delete issue. Bott requested deletion of Issue A for the same reasons that urged upon the commission for the deletion of that issue.

Responsive pleadings are due to be filed tomorrow, July 21st, and Bott has the right to file a reply. Let me just note in this connection, Paragraph Three of the Hearing Designation Order states "In response, Bott states that throughout the six-year effort to obtain his permit, he maintained a good-faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format."

Based upon this language, the H.D.O. at Paragraph
Nine states in pertinent part, "However, as previously noted
in Paragraph Three, Supra, Bott has represented in the instant
proceeding that throughout the comparative proceeding, he
always intended to operate with a commercial/religious
format." The sentence continues, but I'm going to end the
quote here, so I'll close the quote there.

I would hope and trust that in its responsive comments, the Bureau will enlighten the record as to the

source of the quoted language, will comment on the accuracy or 2 lack of accuracy of the facts recited in the H.D.O. and the 3 effect of that on this case, and if you need more time to 4 prepare comments, the direct -- which are directed to these 5 specific matters, I'm prepared to give you more time. 6 MR. GOLDSTEIN: Your Honor, may I suggest it may be 7 helpful at this time to take a look at the request for 8 admission and the Mass Media Bureau's response to request for 9 admission with respect to the matter which you're raising now. 10 JUDGE STEINBERG: It was on the desk here when I 11 I just skimmed it over. I'm just -- what I'm trying 12 to suggest is it would be helpful if we knew basically the 13 basis for these statements and if they're accurate, the source 14 that says they're accurate; if they're inaccurate, the effect 15 on the whole hearing. But that's -- I'm not -- if you want to 16 address that, that's fine. If you don't, that's fine. I'm 17 just saying it would be helpful. 18 MR. GOLDSTEIN: Why don't we -- Your Honor, may I 19 suggest that we go through the chronology that you're 20 proceeding with right now and then after that, let's discuss 21 the admissions? 22 Okay, then the third thing that's JUDGE STEINBERG: 23 presently pending is on July 15, 1993, Bott filed before me a 24 petition for certification to the Commission. Bott requested

that I certify to the Commission the question of whether the

hearing should be held. Once again, Bott argues that this
case was designated for hearing on the basis of an error of
fact and maintains that the Commission should be given the
opportunity to review its H.D.O., but this time with the
correct understanding of the critical facts.

Responsive pleadings are due to be filed on July 28th and Bott has the right to file a reply. At this point, I'm going to make an observation about the two pleadings pending before me. It seems to me that Bott is asking me to do what Bott has already asked the Commission to do, namely to hold that this case was based upon an erroneous reading of the relevant documents and to rule that Issue A must be deleted.

It also appears that I'm being asked by Bott to certify a question to the Commission which is already before the Commission in the context of the petition for reconsideration, specifically whether this case was properly designated for hearing and whether a hearing should be held. I'm seriously considering, when the pleading cycle is completed, deferring ruling on those two matters until the Commission rules.

Now, this -- let me just comment in this context, that with respect to whether the hearing will go forward, I'll state now that the Commission in it's H.D.O. directed that a hearing be held and it's my intention to go forward with the hearing on the date scheduled unless the Commission tells me

1	not to.
2	In other words, if Bott is contemplating the filing
3	of a request for stay, the request should be filed with the
4	Commission, not with me. Anybody want to comment on that
5	chronology of basically what's pending before we get into
6	discovery and stipulations and exhibits and stuff like that?
7	MR. GOLDSTEIN: Yes, Your Honor. On July 16th, that
8	there was a request for admission.
9	JUDGE STEINBERG: All right. Now, I'm going to go
10	over that when I talk about discovery. You know, there are
11	two discovery things pending, but I wanted to break the
12	discovery out from this other material. Mr. Oxenford seems
13	troubled.
14	MR. OXENFORD: Well, Your Honor, I know I said I
15	wasn't going to comment unless it was absolutely necessary,
16	but I'm just a little confused perhaps. My understanding of
17	what you just said was that you would not your present
18	inclination was to allow the Commission to rule on Mr
19	JUDGE STEINBERG: I'm considering it.
20	MR. OXENFORD: Mr. Riley's motions, yet to go
21	ahead with the hearing
22	JUDGE STEINBERG: Right.
23	MR. OXENFORD: regardless of what the procedural
24	status was at that point with regard to the motions filed by
25	Mr. Riley with the Commission and not rule on the motion to

|delete issues. It seems to me a little inconsistent, if there 2 is, in fact, a basis for the deletion of the issue because it was never properly designated in the first place because of a 3 mistake of fact, to nevertheless go ahead with the hearing on an issue that should never have been designated in the first 5 6 place. 7 JUDGE STEINBERG: I have a hearing designation 8 order. It's by the Commission, not by delegative authority. It's by the Commission. This is the Commission speaking. 10 would be -- my present inclination is it would be awfully 11 presumptuous of me, a lower-ranking official, to tell the

Commission. "You don't know what you're talking about." The

1	But I don't think I don't think for instance,
2	it would look what if I deleted the issue and then the
3	Commission rules and says the case was perfectly properly
4	designated for hearing and if I don't delete the issue and the
5	Commission says, "We made a mistake and it never should have
6	been designated to hearing"? I mean, I'm in a no-win
7	situation and I'm not going to substitute my judgement for the
8	Commission's, especially when the Commission is being asked by
9	the same party to do exactly what I'm being asked to do and
10	I'm going to defer this to them I'm considering deferring
11	to them.
12	MR. OXENFORD: I understand.
13	JUDGE STEINBERG: And that's why I'm saying I'm not

2 you and I want to suggest a possible procedure.

1 |in the H.D.O. and then I want to point out something else to

MR. GOLDSTEING: -- what I'm suggesting to the presiding judge is that as we see Paragraph 13 and as we see the Issue A, there are two components of it, Number One, whether he misrepresented facts or lacked candor with -- in connection with his integration pledge or in his opposition to the petition to deny.

I think from the response to the request for admission, we are addressing the question of whether we have, in our possession, information or documentation in support of the statement in the H.D.O. that there was a poten—there was

Your Honor, that attempts to deprive you of knowledge, that
the Bureau has no evidence whatsoever and never had any
evidence whatsoever that Mr. Bott said that. What we have is
a hearing proceeding on a full-fledged, air-tight,
unexceptional mistake and the Bureau is attempting to dodge
that bullet.

JUDGE STEINBERG: Well, what we're --

pledge was a misrepresentation, then the Commission needs to recall Eagle 22 Limited and hosts of other cases, most of them granted at staff level, because the staff of the Mass Media Bureau has never previously taken the view that assigning an on-bill permit is prima facie evidence of misrepresentation in

That, I think, is as much as I want to say on the issue. I understand precisely what you said about your position, Your Honor, on the pleadings, and in fact, I was

ansang of that ag woo recommend the aleadings and I recommend in

the original obtaining of the permit.

1	better grasp of where we are on the request that you certified
2	as a matter of the Commission.
3	JUDGE STEINBERG: Well, that
4	MR. GOLDSTEIN: Your Honor, may I
5	JUDGE STEINBERG: Just let me just say, the due
6	date on that one comments on that would be July 28th and
7	the way I get it is a Ten-Plus pleading with 1 was it
8	1.10682?
9	MR. RILEY: That's correct.
10	JUDGE STEINBERG: 1.106 specifies it doesn't
11	specify any other any different time period for this
12	MR. RILEY: I think you're right about that.
13	JUDGE STEINBERG: than it does for recon. And
14	then you would have the right to reply and you know, I may do
15	that, I may not.
16	MR. GOLDSTEIN: May I comment on Mr. Riley?
17	JUDGE STEINBERG: Yeah. Last comment on this
18	because I don't see that this is getting us anywhere.
19	MR. GOLDSTEIN: Well, the intention and the hope was
20	that it would be getting us somewhere. We did not the case
21	was designated, Your Honor, as pointed out by the Commission.
22	We have responded in what we believe to be an honest fashion
23	to the request for admissions with respect to the aspect of
24	the case that Mr. Riley directed his request for admissions
25	to.

1 We have also filed a request for a motion for the production of documents which I largely addressed to the question, the second aspect of the designated issue. It was our hope and our expectation that we would have documents produced that would then enable us to see what the status of the case was and how the Bureau and the party, the other party would proceed in this case. It would be possible, after this submission and after the receipt of the documents, that we -- Mr. Riley could 10 file a motion for summary decision or that we could go forward 11 with the deposition and we could address -- will have addressed all of the matters that are pending before Your 13 Honor. That was our intention. JUDGE STEINBERG: Let me turn to discovery now and we've already discussed the request for admission, so I'm not going to get into that again. We also have pending a request for production of documents which was served by the Bureau on Mr. Bott and filed with the Commission on July 12, 1993. Pursuant to that request, documents are due to be exchanged by Thursday, July 22nd, and let me just ask Mr. Riley what's the status of that. Will documents be exchanged on that date and 22 will objections be filed? MR. RILEY: Your Honor, we -- Mr. Bott is here in 24 Washington this week and we're reviewing --JUDGE STEINBERG: Is that Mr. Bott in the back of

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the room? 2 MR. RILEY: Yes, it is, Your Honor. 3 JUDGE STEINBERG: So you noticed my ace 4 investigative technique. I picked that right up in as much as 5 -- as much as he's the only one in the back of the room. MR. RILEY: Picked out from the crowd. 6 7 JUDGE STEINBERG: He's the one wearing the red 8 carnation in his lapel. 9 MR. RILEY: We are -- Mr. Bott and I are discussing 10 I fully anticipate filing with respect to at least some 11 of the items of motion for protective order or an objection. 12 Some -- even if we did not object to the category, I expect we 13 would move for a protective order because of the great volume 14 of documents encompassed by the description and I think we 15 could resolve that volume problem by offering the Bureau a 16 sample if we were not to object to the category. 17 Thursday, we will be making a filing with you, Your Honor. 18 JUDGE STEINBERG: Okay, because I was prepared to 19 discuss it today if you wanted to. But if -- you know, you've 20 got until Thursday and I don't want to -- I'm not going to cut 21 you short. 22 MR. RILEY: I don't -- I don't want to file on 23 Thursday something that is unduly obstreporous. I -- we could 24 discuss it today, Your Honor, although I don't really have 25 formulated comments on each of these, I can say this, that in

1 |general, I think that a number of the categories described here -- assuming the legitimacy of the issue as designated, a number of the categories described go beyond what's at stake under that issue, in the view I've taken of the issue, in my view. I think as governed by the H.D.O. But I'm really not in

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1 | whenever. You know, that's okay with me. Just I'd rather you
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   worked things out among yourselves then be at loggerheads
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   about everything. Okay, has -- have there been any
   discussions about discovery?
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              MR. RILEY: There have been. We had -- as you
   ordered, Your Honor, we had a meeting, Mr. Goldstein, Ms.
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7
   Laden and I, and we discussed discovery. Mr. Goldstein may
   want to fill in. I was aware the Bureau would be filing the
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   motion for production. I wasn't aware of the specific
10
    categories at the time of our meeting and as I say, Mr. Bott
11
   and I were discussing it last evening and will be again today.
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              MR. GOLDSTEIN: We also discussed possible
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   stipulation as to the undisputed facts that would be prepared
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   which is the direct case, as we also discussed, the
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   documentation that would be prudent in each party's direct
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    case. So we did make some progress --
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              MR. RILEY: I offered, Your Honor, to prepare what I
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    think would be a stipulation of facts that the Bureau and I
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    and Western would not disagree on, simply to advance the
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   record, like the fact that Mr. Bott did obtain his
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    construction permit and prepared for proceeding, that he did
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    enter into a contract with Western in '92 to sell. And so --
23
    facts there is absolutely no dispute about.
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              JUDGE STEINBERG: What -- joint exhibits, I think --
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I didn't know the hearing was only a one-day hearing.

|-- I think, under those circumstances, we should have -- you 2 know, obviously Mr. Bott's integration statement should be in 3 the record from the first hearing and any other exhibits relating to integration, you know, since it was just a one-day 5 hearing, it wouldn't hurt to put all of his testimony in to 6 get everything in context, even though there probably would be 7 a lot that's irrelevant. I think on -- with respect to the assignment application and R.R.I.'s (phonetic) petition to deny, I think all the pleadings relating to that should be in 10 this record, not just the opposition. But the petition to 11 deny and I understand there was a supplement to that and the 12 opposition and the reply, just the whole --13 MR. RILEY: We, in our meeting --14 JUDGE STEINBERG: -- the whole package. 15 MR. RILEY: In our meeting, Your Honor, I think Mr. 16 Goldstein intended to -- I think I wrote about this --17 intended to package the pleadings and Mr. Bott's imperative 18 hearing testimony as a Bureau exhibit. I may be standing on 19 ceremony, but in view of the formulation and your order prior 20 to prehearing, I suggested to Mr. Goldstein and Ms. Laden that 21 I couldn't join in it as a joint exhibit because your Footnote 22 One said the joint exhibits should contain those segments of 23 the pleadings which led to the designation of this case for

hearing and as you know, the burden of our pleadings is that

1	this case to be set for hearing.
2	MR. GOLDSTEIN: We were proposing
3	JUDGE STEINBERG: However it comes in, I don't
4	really care what it's called.
5	MR. RILEY: I wouldn't object to the relevance of
6	those documents.
7	MR. GOLDSTEIN: We've already agreed to do what you
8	had said, Mr. Riley.
9	JUDGE STEINBERG: Okay, so I don't now, this is a
10	tricky one because I don't see how it's possible, but you all
11	are much more clever than I am and that's the subject of any
12	way of settling this short of a hearing and whether that's
13	possible or not, I don't I really don't know. But I just
14	threw it in there just to let
15	MR. RILEY: We talked about it, but didn't come to
16	did not come didn't come to any I shouldn't say
17	resolution. That sounds like we advanced the discussion
18	further than we did. We came to no formulation that I think
19	would be satisfactory to the Commission not to the
20	Commission, but to the Bureau and to my client.
21	JUDGE STEINBERG: Well, that, basically completes my
22	agenda.
23	MR. RILEY: I would like to take up a matter, Your
24	Honor, if you are at the point of having completed your
25	agenda.

JUDGE STEINBERG: I was just going to -- you know, the last thing was -- is there any problems with the procedural dates that -- I think I was basically as liberal as possible, you know, tried to avoid vacation schedules and holidavs and let me just. you know. say the date for the

Radio Representatives lacked standing, treated it as an informal objection.

In the H.D.O., in one of the terminal paragraphs, said that they granted the informal objection to the extent indicated and they denied Radio Representatives standing. In D.& E., the Commission, in Paragraph Nine at Pike and Fisher, Page 478, said -- says this. In Paragraph A, "When hearing issues involving serious misconduct are designated as the result of a petition to deny, the burden of proceeding" -- I'm skipping some words there, but -- "the burden of proceeding with the evidence and the burden of proof will be placed upon the party making the charges." Of course, that's impossible, Your Honor, here because two things are true. One, Radio Representatives isn't a party to the proceeding and two, they never charged Mr. Bott with what the Commission found in Paragraphs Three and Nine.

Secondly, looking at Paragraph B, "Where issues involving serious misconduct are included in the hearing order without any petition having been filed," -- which is probably our case,-- "the act requires the applicant carry the burden of proceeding" -- and so on, and that's where the Commission placed it.

But then -- and we get to the crux of this -"However, as a matter of fairness in these cases, we believe

the Bureau should be required to make an initial presentation which will serve the limited purpose of delineating the facts at issue and informing the applicant of the precise fact of the question he'd be required to face. The Bureau, therefore,